

BOISE, TUESDAY, NOVEMBER 6, 2007, AT 9:00 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32166

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
REGGIE TIETSORT,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Boise County. Hon. Kathryn A. Sticklen, District Judge.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

Reggie TietSORT was convicted of possession of methamphetamine with intent to deliver; grand theft of a firearm; and defacing, altering or obliterating a manufacturer identification number. On appeal, he challenges the district court's denial of his motion to suppress evidence that was seized from his residence pursuant to a search warrant.

The search warrant was based solely upon facts discovered during a prior consensual search of an area of TietSORT's property outside of his home. He argues that his consent to this initial search was involuntary because the police told him that a warrant was on its way. He also contends that his consent was tainted because he was illegally detained and because the police had previously unlawfully searched his barn.

BOISE, TUESDAY, NOVEMBER 6, 2007, AT 10:30 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33825

LANI BRIGHT,)
)
Plaintiff-Respondent,)
)
v.)
)
MURL BRIGHT,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. James C. Morfitt, District Judge; Hon. Frank P. Kotyk, Magistrate.

Gigray, Miller & Downen, Caldwell, for appellant.

Lovan Roker, P.A., Caldwell, for respondent.

Shortly after they were married, Murl Bright provided his wife Lani Bright with a spouse survivor annuity funded by monthly deductions from his government retirement annuity payments. Some years later, they were divorced and entered into a stipulated divorce settlement regarding the division of property.

The court entered an order stating that Lani was to receive any benefits of the spouse survivor annuity to which she would have been entitled if the divorce had not occurred. Murl argues that this was not the disposition to which he stipulated. He contends that at the time of the divorce, it was unknown if Lani had any right to the continuation of the spouse survivor annuity, and so he merely stipulated that she was entitled to any benefit that the government rules might provide for a divorced former spouse.

BOISE, TUESDAY, NOVEMBER 6, 2007, AT 1:30 P.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32956

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
CHRISTOPHER DAVID FLEGEL,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Hampton & Elliott, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

A grand jury indicted Christopher David Flegel on one count of lewd and lascivious conduct with a minor under the age of sixteen. At trial, the prosecutor requested that the district court also instruct the jury on the crime of sexual abuse of a child under the age of sixteen, as a lesser included offense of lewd and lascivious conduct. The state did not amend the indictment, but the district court instructed the jury on both offenses. The jury acquitted Flegel of lewd and lascivious conduct but did not reach a verdict on sexual abuse. The district court declared a mistrial on sexual abuse.

The state moved to amend the indictment to charge Flegel with sexual abuse of a child. Flegel objected to the amendment. The district court granted the state's motion to amend the indictment. The state then filed a motion in limine indicating that it intended to introduce into evidence a recorded interview of Flegel by a detective. Flegel opposed the admission of portions of the interview. The district court granted in part and denied in part the admission of the interview. At the second trial, a different jury found Flegel guilty of sexual abuse of a child. Flegel filed a motion for a new trial. The district court denied the motion. Flegel appeals.

BOISE, THURSDAY, NOVEMBER 8, 2007, AT 9:00 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33317

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
TIMOTHY DEAN HILL,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

Timothy Dean Hill's five-year-old daughter, G.H., was reported as having inappropriately touched another girl her age. The inappropriate contact led the Orofino police to contact G.H.'s mother and the police informed her that her house was under investigation for possible inappropriate sexual contact between an older sibling and G.H. At the time the inappropriate contact was reported, G.H. was in Boise staying with Hill. G.H.'s mother contacted Hill and requested that he take G.H. to a Children At Risk Evaluation Services (CARES) interview. Hill declined to do so, and eventually G.H.'s mother traveled from Orofino to Boise to take her daughter in for the interview.

On the day of the CARES interview, Hill arrived late at the hospital and refused to sign the consent form. Hill gave two reasons for refusing to sign the form. The first was that he had unanswered questions about the allegation that his daughter had inappropriately touched another child. The CARES employees informed Hill that the allegations against his daughter were made to the police and that the police would be able to answer his questions. The second justification Hill gave for refusing to sign the form was that he did not want his daughter to be labeled as a sex offender.

During the CARES interview, G.H. revealed information about genital-to-genital contact between her and Hill. Hill was arrested and charged with lewd conduct with a minor under sixteen. At trial, Hill objected to testimony from his ex-girlfriend as irrelevant. The district

court overruled the objection and allowed the testimony. Hill testified and was cross-examined regarding his asserted justification for refusing to sign the CARES consent form.

Hill was found guilty by a jury and the district court sentenced him to an indeterminate sentence of twenty-five years, with a minimum period of confinement of ten years. Hill appeals, challenging the relevance of his ex-girlfriend's testimony, asserting he was denied due process when the state questioned him about his failure to follow up with the police and obtain answers to his questions, and arguing that his sentence is excessive.

BOISE, THURSDAY, NOVEMBER 8, 2007, AT 10:30 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32805

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
MARVIN SHANE BISHOP,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Gooding County. Hon. R. Barry Wood, District Judge.

Molly J. Huskey, State Appellate Public Defender; Shannon N. Romero, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Thomas Tharp, Deputy Attorney General, Boise, for respondent.

On May 25, 2005, two carnival workers contacted the Hagerman City Superintendent and reported that a man, later identified as Bishop, had just offered to sell them methamphetamine. The City Superintendent called Chief Miller of the Hagerman police department. Chief Miller followed Bishop and informed him he needed to speak with him about methamphetamine. Chief Miller instructed Bishop that he was going to conduct a pat-down search for weapons. Shortly after Chief Miller began the pat-down search, Bishop turned around to face him. A struggle ensued resulting in the eventual arrest of Bishop for resisting and obstructing an officer.

A cursory pat-down search was conducted after Bishop was arrested, revealing a baggie of methamphetamine in his pocket. Bishop was transported to the carnival area where the two carnival workers identified him as the man who attempted to sell them methamphetamine. After his motion to suppress was denied, Bishop entered a conditional guilty plea to possession of a controlled substance (methamphetamine), I.C. § 37-2732(c)(1), and resisting and obstructing an officer, I.C. § 18-705. He now appeals the denial of his motion to suppress on the grounds that the carnival workers' tip didn't provide reasonable suspicion to believe Bishop was engaged in criminal conduct and Chief Miller lacked an articulable suspicion that he was armed and dangerous.

BOISE, THURSDAY, NOVEMBER 8, 2007, AT 1:30 P.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33677

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
TROY ALTON ALLEN,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Bujak Law, P.L.L.C., Nampa, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

Allen was convicted of driving under the influence and was placed on probation. Twice thereafter he was found in violation of probation terms, but probation was continued with additional terms. After Allen again violated his probation, the district court commuted the underlying sentence and ordered that he serve nine months in the county jail, with credit for seventy-seven days served. Allen filed a motion contending that he was entitled to additional days of credit for time served. The district court did not grant additional credit. Instead, the court filed an amended judgment to clarify its intent that Allen serve nine months in the county jail, over and above any time previously served other than the seventy-seven days for which credit was allowed. Allen appeals, contending the district court violated constitutional protections against double jeopardy and Idaho criminal rules by not granting the additional credit for time already served in jail.

BOISE, TUESDAY, NOVEMBER 13, 2007, AT 9:00 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31661

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
MICHAEL GEORGE GERVASI,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Steven C. Verby, District Judge.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

Michael George Gervasi was stopped for driving his vehicle with a shattered windshield. The officer who stopped Gervasi determined that he was driving under the influence (DUI). Gervasi had two previous DUIs within five years and was charged with felony DUI.

At the beginning of jury selection for Gervasi's trial, the district court announced to the jury pool that Bonner County had "charged a citizen with a felony offense." Outside the presence of the jury pool, Gervasi moved for a mistrial based on any prejudice that may have been caused by referencing the charge as a felony. The district court denied Gervasi's motion. However, the district court asked each member of the jury pool to provide a written answer to the question: "What is your understanding of the nature of the charge against Michael Gervasi?" Four potential jurors from the pool identified the charge as a felony. Gervasi and the state then agreed to exercise two of their peremptory challenges each to remove these four venire members. The district court proposed to instruct the jury that its statement was not evidence, but Gervasi objected to this additional instruction and it was not given. Gervasi was found guilty of felony DUI. Gervasi appeals, asserting that the district court abused its discretion in denying his motion for a mistrial and that the denial of his motion for a mistrial cannot be deemed harmless error.

BOISE, TUESDAY, NOVEMBER 13, 2007, AT 10:30 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33435

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
VAL J. BUELL,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John P. Luster, District Judge.

Molly J. Huskey, State Appellate Public Defender; Shannon N. Romero, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

Buell pleaded guilty to driving under the influence, reserving the right to appeal the denial of his motion to suppress evidence. Buell contends that the district court erred by concluding that his participation in field sobriety tests was not coerced by the arresting officer's statement that "you're required by law to do them." Buell further contends that the officer's statements and actions impermissibly transformed the traffic stop into an illegal arrest.

BOISE, TUESDAY, NOVEMBER 13, 2007, AT 1:30 P.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32445

DOUGLAS E. STUART,)
)
Petitioner-Appellant,)
)
v.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Molly J. Huskey, State Appellate Public Defender; Sara B. Thomas, Chief, Appellate Unit, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

Douglas E. Stuart pled guilty to felony eluding a peace officer. The district court sentenced Stuart to a unified term of five years, with a minimum period of confinement of two years. Stuart filed a pro se application for post-conviction relief, alleging that he was provided with ineffective assistance of counsel because, among other reasons, court-appointed counsel failed to advise him during the presentence investigation. As relief, Stuart requested a new sentencing hearing where he could challenge the presentence investigation report. The state filed a motion for summary dismissal. The district court appointed Stuart post-conviction counsel. Stuart did not respond to the state's motion for summary dismissal, and the district court summarily dismissed Stuart's application. Stuart appealed. His appellate brief asserted that the district court failed to provide him with adequate notice prior to summarily dismissing his claim. The state moved to have the case remanded to the district court to provide Stuart with notice on a claim not addressed in the state's motion for summary dismissal. Stuart stipulated to the motion and the case was remanded. The district court filed a notice of intent to dismiss Stuart's application. Twenty-one days later, the district court summarily dismissed Stuart's application. Stuart again appeals, asserting that his application raised a genuine issue of material fact as to whether his counsel provided ineffective assistance by failing to advise him during the presentence investigation.

BOISE, THURSDAY, NOVEMBER 15, 2007, AT 9:00 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33383

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
EUGENE LEE SAPUTSKI,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John P. Luster, District Judge.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

On October 18, 2005, Eugene Lee Saputski was stopped by Officer William E. Eddy for violating the speed limit in Spirit Lake, Idaho. Saputski was traveling at 24 miles per hour (mph) in a posted 15 mph zone. Upon contacting Saputski, Officer Eddy suspected that he was intoxicated, and subsequently arrested Saputski for driving under the influence. Saputski filed a motion to suppress all evidence obtained as a result of the traffic stop, claiming that he was not driving faster than the legal speed limit. He argued that Idaho Code sets the speed limit for all residential areas in Idaho at 35 mph, and local authorities can only reduce the limit if they conduct a traffic or engineering study which indicates that 35 mph is faster than reasonably safe for the area. Saputski claimed that the City of Spirit Lake failed to conduct a study prior to posting the speed limits at 15 mph, and therefore the limit had been illegally changed. As a result, the applicable speed limit when he was stopped was 35 mph and he was not traveling in excess of that speed. The district court denied Saputski's motion to suppress, holding that the validity of the posting of the speed limit was irrelevant to the court's decision and that Officer Eddy's objective observations lead to a reasonable suspicion to stop Saputski for driving faster than the posted speed limit.

On appeal, Saputski raises the issue of whether the district court erred in denying his motion to suppress.

BOISE, THURSDAY, NOVEMBER 15, 2007, AT 10:30 A.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33469

WILLIAM KRIS DERUSHE,)
)
Petitioner-Appellant,)
)
v.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John P. Luster, District Judge.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

William Kris DeRushe was convicted of second-degree murder, unlawful possession of a firearm, and a persistent violator enhancement. This court upheld the judgments of conviction and sentences on direct appeal, *State v. DeRushe*, Docket No. 30558 (Nov. 24, 2004) (unpublished), and DeRushe filed a petition for post-conviction relief. In his petition, DeRushe alleged counsel was ineffective for not requesting a bench trial or a psychological evaluation, not calling and preparing certain witnesses, and denying DeRushe the opportunity to testify on his own behalf. He further alleged the prosecution engaged in misconduct by withholding evidence and relying on perjured testimony. Finally, DeRushe alleged the jury committed misconduct by not following the jury instructions. The state moved for summary disposition, which the district court granted. DeRushe appeals, raising the issue of whether the district court erred in summarily dismissing his petition for post-conviction relief where notice was inadequate, where the district court relied on its own memory and where a genuine issue of fact was asserted regarding the claim that defense counsel denied him his constitutional right to testify.

BOISE, THURSDAY, NOVEMBER 15, 2007, AT 1:30 P.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33561

A. WILLIAM KENDALL, trustee of the)
A.W. KENDALL TRUST,)
)
Plaintiff-Respondent,)
)
v.)
)
GLENN L. JOHNSON,)
)
Defendant-Appellant.)
_____)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas F. Neville, District Judge.

Foley Freeman Borton, PLLC, Meridian, for appellant.

Ringert, Clark CHTD, Boise, for respondent.

Glenn L. Johnson was an officer of J.M. Holding Co., a now-defunct Idaho corporation. In 2002, A. William Kendall, trustee of the A.W. Kendall Trust, sued J.M. Holding Co., Johnson as a statutory trustee, and several other individuals and entities, seeking a judgment and decree of foreclosure for \$201,750 for monies owed on a deed of trust securing property J.M. Holding Co. had contracted to buy from him in 2000. Johnson failed to answer, and a default judgment for the entire \$201,750 plus interest and costs of the suit, minus \$100,000 which Kendall had already received, was entered against him.

Johnson filed a motion to set aside the default judgment. After a hearing, the court denied the motion. At the same hearing, the court indicated the necessity to amend the default judgment to limit and clarify Johnson's liability as that of a statutory trustee as opposed to an individual. Both sides agreed.

Johnson then requested a hearing pursuant to Idaho Rule of Civil Procedure 55(b), alleging that Kendall was required to present additional evidence to justify the full \$201,750 judgment against Johnson since, in the pleadings, Kendall had failed to allege to what extent Johnson was, or could be held, liable as a statutory trustee. The court denied the request for a hearing, and Johnson now appeals.